

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Air Canada v. Ron Andrews, Gerald Dodds and Terry Hanson, 2012 OHSTC 19

Date: 2012-06-22
Case No.: 2011-14
Rendered at: Ottawa

Between:

Air Canada, Appellant

and

Ron Andrews, Gerald Dodds and Terry Hanson, Respondents

Matter: Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer under subsection 145(2)

Decision: The direction is varied

Decision rendered by: Mr. Michael McDermott, Appeals Officer

Language of decision: English

For the appellant: Mr. Stephen Bird, Counsel, Bird Richard

For the respondent: Mr. Ian Roland, Counsel, Paliare Roland Rosenberg Rothstein LLP

Canada

REASONS

[1] This decision concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) against a direction issued by Health and Safety Officer (HSO) Domenico Iacobellis on February 4, 2011, pursuant to paragraph 145(2)(a) of the Code following a finding of danger under subsection 129(6). A stay of the direction was issued by Appeals Officer Richard Lafrance, pursuant to subsection 146(2) on May 16, 2011.

Background

[2] At approximately 6:00am on January 24, 2011, the respondents invoked the right to refuse work they believed to constitute a danger pursuant to subsection 128(1) of the Code. The three respondents, Ron Andrews, Gerald Dodds and Terry Hanson, are employed by Air Canada, the appellant, as tow operators at the Toronto Pearson International Airport, hereinafter referred to as Pearson International. Their concerns stemmed principally from Air Canada's decision to modify the crew of the Douglas Towbarless tractor from two persons holding a Greater Toronto Airport Authority (GTAA) D-Airside Vehicle Operator's Permit or D-AVOP, referred to commonly and hereinafter as a D-license, to two persons one of whom would hold a D-license and the other who would hold a GTAA D Assist or DA-license.

[3] The DA-license allows for driving in the apron but does not permit the holder to drive any vehicle in the airport manoeuvring areas. The manoeuvring areas comprise the runways and taxiways but not the apron adjacent to terminal buildings. A D-license is required to drive vehicles in the manoeuvring areas. The Douglas Towbarless tractor, its particular features and complexities will be described in more detail below. At this point, suffice it to note that, unlike tractors using a tow bar, the Towbarless model lifts and secures the aircraft's front wheel assembly into the tractor's cradle and then proceeds with the tow to whatever airport destination has been scheduled.

[4] The Labour Program at Human Resources and Skills Development Canada (HRSDC) was notified of the refusals at about 8:00am on January 24, 2011. The HSO attended the work-site at approximately 12:00 noon the same day. The three employees, faced with the prospect of a modified crew consist, expressed the belief that a DA-licensed employee would have insufficient training on and knowledge of the airside manoeuvring area in order to perform safely the role and duties of the second crew member in the Douglas Towbarless tractor. They voiced concerns that a DA-licensed employee would not be able to use the radio while in the manoeuvring areas and that the lack of a secondary D crew member with knowledge of runways and taxiways would increase the D operator's already significant responsibilities for driving and communicating with the ground traffic control towers. While the employees completed individual statements of refusal to work the HSO noted that all three agreed to the statements and he verified that it was a group refusal. The three statements of refusal read as follows:

Mr. Andrews: I feel that by putting an individual with me in the tug, who does not have the same training is unsafe. This individual does not have the airside knowledge that is required of the left seat (pass) He would need to pass a 'D' exam with the GTAA, to have airside knowledge.

Mr. Dodds: I believe it is unsafe to tow with anyone who is not in possession of a 'D' license due to their lack of knowledge and capability on the "manoeuvring area" of the airport. The complex environment of runways and taxiways requires knowledge and training pertinent to avoiding any ATC incursions.

Mr. Hanson: Company directive issued June 28, 2010 prevent me from using communication device while driving in movement/manoeuvring areas. My role based on this new procedure will be to not only to communicate with apron/ground but to also be aware of other calls being made to other traffic around me. Unable to perform all communication as well as driving duties and remain aware of the aircraft that I am attached to.

[5] Air Canada's representatives told the HSO that there is no requirement to have two D-licensed employees in a tow tractor and maintained that a change of crew composition for the Douglas Towbarless tractor was motivated by a need for more flexible scheduling of the D operator complement. They reported that a risk assessment had been conducted in May 2010 with one workplace health and safety committee member present, and that a two day trial run of the D with DA crew had been undertaken the week prior to the refusals.

[6] The HSO recorded a comprehensive 23 bullet point list of facts he found to be established by his investigation covering such areas as marshalling duties prior to commencing a tow, responsibilities during a tow, qualifications and training provided, comparative practices at other airports and particular features of Pearson International. Prior to moving an aircraft the two person crew is responsible for such duties as activating the alternate power unit (APU), a thirty point check of the aircraft exterior, attaching the tow and releasing the aircraft brake.

[7] Once the marshalling preliminaries are completed, contact is made with airport ground control for clearance and is maintained for authorization of movements throughout the tow. The HSO determined that under the existing procedure the two D-licensed crew members would share these responsibilities with one operating or driving the tow and maintaining visual situational awareness of traffic around the airport and the other taking on the radio communications function, receiving instructions from the ground tower, confirming them back and switching frequencies as the tow moved from the range of one tower to another.

[8] Under the modified procedure the HSO found that these duties would be apportioned differently between the two tow crew members. He concluded that, while a

DA-licensed employee could handle preliminary marshalling duties, the employee is unable to operate radio communications and once the tow with an aircraft is in motion DA roles and responsibilities would end until the destination is reached. The Tow Operator would therefore have to add the communication functions to the driving and maintenance of situational awareness duties.

[9] The distribution of functions between D and DA-licensed employees noted by the HSO appears to relate to facts he established with respect to qualifications and training for the two categories. He reports that the D-license is issued by the GTAA after employees take a prescribed training course with practical and written content, and successfully pass tests set by the Authority. While the DA-license is also issued by the GTAA, he says the Authority does not set tests for this category. Although the HSO indicates that the DA-licensed employee will be trained in the use of a radio, he concluded that the DA will not be permitted to use it in the manoeuvring area. Lastly, he reports that DA employees receive no training on specific details of the manoeuvring area such as the designation of runways and taxiways. These and certain other factual elements in the HSO's report are disputed by the Appellant and, as will become evident below, are matters requiring close consideration in this appeal.

[10] In arriving at his decision, the HSO takes cognizance of additional duties and responsibilities referred to in the previous paragraph that he found will fall to the sole D-licensed member of the two person crew of the Douglas Towbarless tractor. He notes that tow operators work in all weather conditions and that the D operator will have to perform multiple tasks since the second crew member will be unable to use the radio and will lack knowledge of manoeuvring area geography. He concluded that these factors possibly put the employees at risk of an incursion that may result in injury and found that a danger within the meaning of the Code does exist. He issued the following direction that is subject to this appeal:

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

On January 24, 2011, the undersigned health and safety officer conducted an investigation following a refusal to work made by **Gerald Dodds, Terry Hanson, Andrew Rons** (sic) in the work place operated by Air Canada, being an employer subject to the *Canada Labour Code*, Part II, at P.O. BOX 6002, (Tow Operations) TORONTO AMF, Mississauga, Ontario, L5P 1B4, the said work place sometimes being known as Air Canada – (Tow Operation).

The said health and safety officer considers the performance of an activity constitutes a danger to the employees while at work:

Implementing the process of changing to one 'D' licences employee and one 'DA' licences employee while performing towing operations constitutes a danger. This new procedure adds the

additional task of monitoring the radio and communicating with the various control towers while operating the tow tractor and maintaining situational awareness of the airfield. This requires the 'D' employee have his/her attention shifted between multiple tasks and possibly putting them at the risk of an incursion which may result in injury.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to alter the activity that constitutes the danger immediately.

Issued at Mississauga, this 4th day of February, 2011.

Domenico Iacobellis
Health and Safety Officer
Certificate Number: ON1279

Issues

[11] The first issue I have to determine is whether or not the Health and Safety Officer erred when he found that a danger does exist in the case of the work refusals invoked by the respondents pursuant to subsection 128(1) of the Code.

[12] In the event that I conclude that the Health and Safety Officer did not err in his finding of danger, I must consider whether or not the direction he issued that is under appeal is justified and appropriate.

Evidence

[13] The following information is based on uncontested, essentially descriptive evidence provided in testimony or in exhibits entered by the parties during the hearings. Hearings were held in Toronto on September 27 and 28 and on November 30, 2011.

[14] The appellant called two witnesses. The first, Mr. John Spellacy, is Air Canada's Manager, Safety Programs at Pearson International. His employment with the company dates back to 1984, initially as a Station Agent and, from 1995, as Health and Safety Coordinator in the bargaining unit until assuming his present functions in 2010. Mr. Don Campbell, the second witness for the appellant, is Training Design Manager, Aircraft and Baggage Services, a position he took up some 18 months prior to the hearings having previously served for 22 years as a Station Agent at Pearson international.

[15] The respondents also called two witnesses. The first, Mr. Craig Adams, is Acting Tow Training Instructor for Air Canada at Pearson International and a member of the bargaining unit. Mr. Adams has been a Station Attendant with the company for 32 years, some 25 of which have been spent in the tow department. He has been a full time trainer for the past eight years, accredited as such by the GTAA. He is also accredited by Industry Canada as an examiner for the Restricted Radio Operator Certificate with

Aeronautical Qualification, most often referred to as the ROC-A. Mr. Adams is Air Canada's only full-time trainer for the D and DA-license training programs. Mr. Terry Hanson, the second respondent witness, became a Tow Operator some four years prior to the hearings having served in other capacities during his thirty-two years with Air Canada. Mr. Hanson was one of the refusing employees.

[16] The GTAA D-license permits the holder to drive vehicles in the manoeuvring area including, but not limited to, the Douglas Towbarless tractor. However, due to the complexity of the latter vehicle, Air Canada provides an additional four weeks of training for its operators. Candidates for the GTAA D-license training program at Air Canada generally have at least two years' experience as a Station Attendant, they must have a valid provincial driver's license and hold a current ROC-A certificate. Industry Canada publishes a study guide available to ROC-A candidates and Air Canada has developed a lesson plan for a four hour course for employees seeking the qualification [Exhibit 1, Tabs 2a and 2b]. Successful completion of the course is designed to equip the participants with knowledge of the specialized alphabet, language, protocols and procedures used in international radio communications.

[17] The training syllabus for the D-license is set down in the GTAA Lesson Plan [Exhibit 1, Tab 1]. The course is given by Mr. Adams and comprises seven subject matter modules plus a concluding eighth written exam module. The first module addresses Airport Traffic Directives (ATDs) with the GTAA AVOP video and related discussion taking up the first hour of an hour and a half session. Completion of this module should familiarize candidates with rules of the manoeuvring area roads, taxiways and runways and enable them to correctly identify airfield markings, lighting and other signage. The second module is a two hour session on airport radio communications building on information candidates would already have by virtue of holding the ROC-A certificate.

[18] Modules three through seven involve driver practice in a radio equipped van or similar vehicle, starting with an orientation drive in the manoeuvring area during which the candidate observes the instructor who handles both the driving and radio communications. D candidates move next to a session of driving under supervision of the instructor who handles the radio communications, followed by three sessions, still under the instructor's supervision, with candidates both driving and handling the radio communications with the Air Traffic Control (ATC) ground control towers. Each of these modules is scheduled for one and a half hours with the last half hour devoted to airport geography drills that include filling in blank AVOP airfield maps with appropriate markings.

[19] The last one hour exam module comprises three tests set by GTAA requiring a minimum pass grade of 90% for each test. The practical test must be given and assessed by an authorized GTAA employee rather than an accredited Air Canada employee. While the Lesson Plan calls for twelve hours of classroom and driving practice time including the final exam, the entire D-license training program at Air Canada is spread over two weeks or ten working days allowing additional time to be spent on particular parts of the

syllabus. The D-license is valid for three years and permit holders are required to take both written and practical renewal tests. Mr. Adams also gives the renewal course.

[20] It is important to note that Air Canada does not regard the D-license as entitling the holder immediately to assume the operator's role for the Douglas Towbarless tractor. Characterizing it as the meat and potatoes of the Towbarless tractor training, Mr. Spellacy described some four weeks of further instruction, job shadowing and supervised driving of the tow tractor provided to a candidate, under Mr. Adam's auspices, before assignment as a crew member to a scheduled tow. He testified that there are written tests and practical evaluations made throughout the training period. The tests and evaluations are designed and administered by Air Canada staff with Mr. Adams playing a significant role. The practical evaluation pass mark is 100% [Exhibit 1, Tab 3]. With respect to the candidate success rate, Mr. Spellacy ventured an attrition level of some fifty percent after the first ten day GTAA training program.

[21] The DA-license, also issued by the GTAA, is the basic license required by Station Attendants that permits them to drive in the apron area but not in the airfield beyond. DA-license holders are not required to have the ROC-A qualification. Training requirements are set by the GTAA but, as with the D-license, training is carried out by Air Canada staff including Mr. Adams. The course content includes viewing of the AVOP video, instruction on airport geography, signage and lighting, hand signals and the various elements associated with a Station Attendant's duties. Candidates are given a 30 question multiple choice test and required to show their awareness of airport geography, as well as being required to pass a practical test for driving on the apron. The GTAA sets the tests but they may be administered by Air Canada personnel accredited for the purpose. DA-license holders are required to pass a written renewal test every three years.

[22] The DA-licensed Tow Assist/Signalman is the position that Air Canada has endeavoured to deploy as the second crew member for the Douglas Towbarless tractor. The incumbent would not operate or drive the tractor but would be expected to handle radio communications as well as acting as a second set of eyes for the operator. The Tow Assist position, the levels of its incumbent's training and experience are at the root of the refusals and of the appeal. The HSO in his report consistently refers to the incumbent as the DA employee. During the hearings the term Tow Assist was used. A candidate for Tow Assist training would need to hold a GTAA DA-license before entering the program. The lesson plan [Exhibit 1, Tab 13] describes a 31 hour course given over four days, two in class and two described as on the job training. Maximum enrollment per class is six trainees split into two groups of three for the two days of practical on the job training. A full list of the components of the course is contained on page five of the lesson plan [Two days have been added to the instruction time since the direction was stayed].

[23] Most Tow Assist trainee candidates will not already hold the ROC-A certificate, although they may be provided with a copy of the Industry Canada study guide prior to commencing training. Three hours are set aside on day one for radio communications

training, including simulated communications, information on local radio frequencies and a review of the ROC-A study guide. A further 90 minutes are reserved on day two for taking the ROC-A examination. 45 minutes are spent on airfield geography to refresh and supplement knowledge already gained in acquiring the DA-license. Other components of the course include classroom and practical instruction on the 30 point walk round of an aircraft before it is moved, pre-tow and tow checklists, hand signals, exposure to but not driving of the Douglas Towbarless tractor and field visits to such points as an ATC ground control tower.

[24] As the name suggests, the Douglas Towbarless tractor does not use a tow bar but rather lifts the front wheel assembly of the aircraft into the tractor's cradle. It apparently offers the advantage of higher speed tows than can be effected with a tow bar tractor and, unlike the latter, does not require a tow crew member to be placed on the aircraft flight deck when a tow is in progress. It is equipped with a computerized drive by wire steering system rather than the direct steering mechanism found with the tow bar tractor. This system facilitates individual directional turning or "crabbing" of the tractor wheels. The driving sensation apparently takes some getting used to since there is a lag in the computerized response to the steering wheel unlike the immediate response of direct steering [Exhibits 3, 4 and 5, photographs of the tow and its features].

[25] The seat and driving console inside the cab swivel 180 degrees to permit the driver to face the aircraft as the tractor backs in to pick up its front wheels and then swivel back to start the tow. The Tow is a right hand drive vehicle. There are two radios installed on the left hand, passenger side of the cab across from the driver, one for ATC ground control and the other for the company network. The Douglas Towbarless tractor comes in three sizes allowing for different sizes of aircraft to be accommodated. Air Canada has been using the Douglas Towbarless tractor for some 15 years. It is the only airline at Pearson International to do so and does not use it elsewhere. There was mention that another carrier at the airport may use a towbarless tractor but not one manufactured by Douglas.

[26] Evidence given as to the tow tractor crew consist used by other companies operating at Pearson International indicates a D plus DA-license configuration. Air Canada's practices at other Canadian airports indicate a two D crew at Montreal, a D plus DA crew at Vancouver and Ottawa, and a D plus a maintenance employee at Halifax. Calgary apparently lacks D-licensed personnel and towing is performed by maintenance staff.

[27] Factual evidence as to GTAA requirements for tow tractor crews confirms that the operator of the tow must hold a valid D-license and an ROC-A. There is no GTAA rule that requires two persons in a towbarless tractor when performing an aircraft tow in the manoeuvring area. While there is nothing in the Air Traffic Directives (ATDs) that appears to prevent a second crew member in a towbarless tractor who holds an ROC-A from handling radio communications, GTAA procedure requires the operator, that is the driver, to have radio contact with the ATC ground control and indicates that the operator

will be held responsible if something goes wrong. This latter information is found in Exhibit 1, Tab 7 and will be referred to again below.

[28] Finally, reference was made in the course of hearings to Pearson International being Canada's busiest airport, as well as to its size and complexity of operations with a fair share of runway and taxiway "hot spots". Claims that upwards of 100 tows may need to be undertaken by Air Canada tow crews in the space of 24 hours, some sixty percent using one of the eleven Douglas Towbarless tractors owned by the company, and with some tows covering up to seven kilometres in distance, were not fundamentally disputed. It was generally accepted that towing operations take place in all weather conditions [Exhibit 2, the GTAA overall map of Pearson International and Exhibit 7, a taxiway and runway chart emphasizing hot spots, illustrate the size and complexity of the airport].

Submissions of the parties

Appellant's submissions

[29] Counsel for the appellant argues two essentially preliminary issues before addressing the main substance of the appellant's case. He first submits that the work refusals were anticipatory in nature in that the refusing employees had never worked with a Tow Assist employee. Second, he submits that there was an overlying labour relations issue and points to a decision of the Canada Labour Relations Board in 1981 when Part II of the Code was Part IV and the work refusal provision was section 82.1 instead of the current subsection 128(1). The relevant statement from the Gallivan and Devco decision is as follows:

An employee's right to refuse under section 82.1 must be used wisely and only in the interests of safety. To abuse that right by coupling it to other interests such as to gain an advantage in collective bargaining will, in the long term, defeat the purpose and attainment of the goals of Part IV of the Code. [...] Any employee refusal which coincides with other labour relations conflicts will receive very close scrutiny from the Board.

[30] Questioned during examination in chief about the overlying labour relations issue and its impact on tow operations, Mr. Spellacy, referred to a period some three years previously when a number of Tow Operators had bid out of the position leading to difficulties in staffing the tows. Mr. Spellacy, who was a member of the bargaining unit at the time, recalled that the Tow Operators concerned who would have held D-licenses were seeking a premium above remuneration provided in the collective agreement. The matter went to arbitration and a ruling that, according to Mr. Spellacy, found the bidding out amounted to concerted action and required the tow operators to remain in the position for some three years. Responding to a question about the approximate expiry date of the three year period, Mr. Spellacy said that it would have been around May and June of 2011.

[31] Preliminary issues apart and in summary, Counsel for the appellant argues that several of the findings and determinations made by the HSO during his investigation and subsequently recorded in his report are incorrect and not supportable. He further submits that the HSO failed to examine or take account of a number of factors relevant to the issues raised by the refusing employees. Had the HSO drawn different and, in the appellant's view, correct conclusions from his findings and extended his investigations to matters not considered, it is argued that the HSO would have reached a decision of "no danger" with respect to the employer's change of the Douglas Towbarless tractor crew consist from two D-licensed employees to one D-licensed operator accompanied in the second seat by a Tow Assist employee.

[32] In the alternative, even if after correcting what the appellant views as mistakes and omissions in his findings and investigations, the HSO had still found a danger to exist then Counsel submits that the appropriate direction should have been limited to addressing training deficiencies.

[33] As detailed above, the essence of the HSO's findings is that the D-licensed Tow Operator, whose focus should be on driving and situational awareness, faces added responsibilities in the absence of a D-licensed employee in the tractor's second seat. The HSO finds that the Tow Assist employee will be unable to use the radio and will lack sufficient knowledge of airfield geography. He concludes that the consequent need for the D operator/driver to take up the slack in both respects and to shift attention between multiple tasks portends a risk of incursion that may result in injury. In responding to the HSO's position, Counsel for the appellant challenges his findings and conclusions with reference to testimony given and evidence entered during the hearings.

[34] Early in his submissions Counsel argues that there is great similarity between responsibilities envisaged for the Tow Assist employee and those in place for the second D-licensed crew member who is not the Tow Operator and who does not drive the tow tractor. He lists those responsibilities as comprising marshalling and other tow procedures, radio communications and awareness of airport geography. Having identified similar responsibilities, Counsel highlights what he submits is the comparability of subject matter included in the Tow Assist training program, particularly with respect to the radio communications and airfield geography components, and that provided in the GTAA D-license lesson plan.

[35] With respect to radio communications, Counsel submits that both the Tow Assist and the D-licensed second crew member will hold the ROC-A certificate and notes that three hours are set aside for radio training in the Tow Assist training program [Exhibit 1, Tab 13, page 5] but only two hours in the D training lesson plan [Exhibit 1, Tab 1, page 13]. Counsel argues that both employees have comparable training in radio communications and that it has always been the appellant's intention that the Tow Assist employee should operate the radio just as has been the case with the D-licensed second crew member.

[36] The issue of whether or not GTAA rules require two persons in a tow tractor performing a tow is addressed in Mr. Spellacy's testimony and in evidence he obtained from GTAA officials. E-mail correspondence he had with the Senior Manager Safety and Security Operations and with the Coordinator, AVOP Examiner and Trainer Operations, in September, 2011, confirms there is no GTAA or AVOP rule or requirement to have two persons in a tow tractor when performing a tow in the manoeuvring area although the driver must hold a D-license and an ROC-A [Exhibit 1, Tab 7]. [The HSO's finding in this respect was that the GTAA does not require two D Tow Operators to be assigned to a single tow]

[37] Mr. Spellacy initiated the e-mail correspondence on a somewhat different issue and that was to ascertain, what if anything, the GTAA rules say about a Tow Assist operating the radio while occupying the second seat in the tractor during a tow. The replies are not altogether definitive. They indicate that there is nothing in the ATDs that addresses operation of the radio by a DA-licensed Tow Assist with an ROC-A certificate but that the Tow Operator must maintain radio contact with the ATC ground control and would be held responsible if something goes wrong.

[38] This information is consistent with the split of responsibilities between the Towbarless Tractor Operator and the Tow Assist described at Chapter 6, page 18, of Air Canada's Publication 70 [Exhibit 1, Tab 4]. The Tow Operator is listed as responsible for "Establishing communications with airport ground control" and "Monitoring all communications." The Tow Assist is responsible for, "Occupying the observers seat in the tow tractor to communicate hazards and/or instructions to the Tow Tractor Operator, as required" and for "Maintaining communication with the Tow Tractor Operator during tow." This split of responsibilities is repeated verbatim in slides 25 and 26 at pages 40 and 41 of the Tow Assist Lesson Plan. After some equivocation in his testimony, Mr. Spellacy concluded that the HSO's finding that the Tow Assist will be trained in the use of the radio but "will not be permitted to use the radio while in the manoeuvring area" is incorrect. He indicated that there is nothing in the rules to prevent a Tow Assist who holds an ROC-A from using the radio.

[39] Counsel for the appellant submits, contrary to the HSO's finding that that the Tow Assist "does not receive training on the specific details of the manoeuvring area, specifically all the designations of the runways and taxiways", that the Tow Assist will have sufficient training and knowledge of airport geography to meet the responsibilities of the position. The specific 45 minute instruction slot set aside for airport geography in the Tow Assist Lesson Plan is characterized as a refresher of knowledge the candidate will already possess as a DA-licensed employee.

[40] Mr. Don Campbell, who indicated that he had taken the DA written test every three years during his 22 years as a Station Attendant, testified that airport geography in the manoeuvring area is a required part of DA training program and that attention is paid to airfield signage and lighting. Candidates are shown the AVOP video on airport driving and he referred to his being taken on a four hour drive by the instructor. Both Mr.

Campbell and Mr. Spellacy confirmed that the DA-license written test includes a 30 question multiple choice exam and requires candidates to demonstrate awareness of airport geography by identifying places and markings on an unmarked map of airfield taxiways and runways. Examples of the unmarked maps are shown in Exhibit 1, Tabs 15 a and b.

[41] It is evident from Mr. Campbell's testimony and from the presence of unmarked maps in the airport geography section of the Tow Assist lesson plan (following page 24) that similar exercises will be required of the Tow Assist candidates. Counsel calculates that airport geography is accorded a total of four hours in the GTAA D-license training program and postulates that the Tow Assist refresher instruction time of 45 minutes is, at worse, only three and a quarter hours less. He questions that the difference in training time could be sufficient to justify a danger finding and, in line with the appellant's alternative position, argues that in any event increased instruction time for the Tow Assist candidate would remedy any deficiency.

[42] Countering the HSO's finding that the DA-licensed employees are not tested by the GTAA, Mr. Spellacy confirmed that they are tested according to GTAA standards. As indicated above, the written and practical tests are set by the GTAA but the testing may be administered by Air Canada personnel accredited by the Authority for the purpose. DA-licensed employees are required to pass a license renewal written test every three years.

[43] A related matter also contested by the appellant, concerns the HSO's finding that, when an aircraft is being towed in the manoeuvring area, the Tow Assist's roles and responsibilities end until the destination is reached. Counsel argues that the responsibilities of the Tow Assist remain the same as those of the second D-licensed employee who occupies the observer seat in the tow. The split of duties identified in Air Canada's Publication 70 is repeated verbatim in the Tow Assist Lesson Plan including the Tow Assist's responsibility to communicate hazards and/or instructions to the Tow Operator during a tow.

[44] In addition to contesting specific findings made by the HSO, the appellant alleges he failed to note or take sufficient account of certain factors relevant to the refusals. While he did take note of Air Canada's practice with respect to the tow crew consist at other Canadian airports, Counsel submits that the HSO took no account of the practices of three other tow service providers at Pearson International who, as Mr. Spellacy informed him, do not deploy a two D tow crew.

[45] Counsel also takes issue with the HSO failing to speak to the D-licensed Tow Operator who participated in the pilot run to inquire if he had concerns with the crew consist. Similarly, he takes issue with the HSO not contacting either the DA-licensed Tow Assist who also took part in the pilot run or the employee who was scheduled to take the observer's seat on the day of the refusals, to ascertain their levels of training and knowledge.

[46] Counsel asserts that the HSO paid scant attention to the risk assessment of May 7, 2010, [Exhibit 1, Tab 6] where it is argued he would have found confirmation of the adequacy of Tow Assist training for the duties of the position and would have seen that the use of a Tow Assist crew member was not identified as a risk by the local workplace health and safety committee. The HSO's finding that the risk assessment was not discussed with the local health and safety committee was contradicted by Mr. Spellacy who was a bargaining unit health and safety coordinator at the time the assessment was conducted.

[47] On "An analysis of the causes of airfield incursions attributed to ground vehicles", an article published by the Transportation Research Board (TRB) in the United States based on a study of 2774 airfield incursions at nearly 450 airfields in the decade ending in January 2008 [Exhibit 1, Tab 10], Counsel submits that the HSO gave the study too much weight. In his report the HSO listed from the article four primary roots of incursions: 1. inadequate training; 2. lack of situational awareness; 3. lack of proper communication; and 4. driver distraction.

[48] Counsel argues that the HSO accepted the abstract without going behind the factual content of the full report. He refers to the four categories of severity of runway incursion identified in the article from category D, little or no chance of collision, to category A, requiring extreme action to avoid a collision or actually involving a collision. He notes that category A and B incursions accounted for only five percent of the incidents studied and that category D covered sixty percent of the incidents. He further argues that none of the situational awareness examples cited in the study applied to the circumstances of the refusals and that some 25% of the incursions reported were caused by pedestrians and others by taxis and vehicles with no functioning communications equipment. Some of the incidents reported involved personnel with no formal training for airport operations. Counsel argues that the study portrays an extremely low risk of incursion and the HSO should have concluded that it does not support a finding of danger.

[49] Exhibit 1, Tab 11, is an extract from a Transportation Safety Board (TSB) report on a runway incursion at Pearson International in November 2007. The report notes that the incident involved two aircraft and that at least one of the pilot crews was unfamiliar with the airport and was approaching the limit of the crew day. Counsel submits that the HSO should have discounted the document.

[50] Counsel's final submissions draw attention to points raised in the respondents' testimony. Two such points need mention here. As part of their evidence, Counsel for the respondents entered a video made for the Discovery Channel in which Mr. Craig Adams, the full time tow bar tractor instructor took a camera person out for a demonstration run in the Douglas Towbarless tractor, towing an aircraft and entering a runway in the manoeuvring area. In doing so, Mr. Adams handled the marshalling duties, driving and communications with ATC ground control towers without the aid of a second tow crew

member. Counsel for the appellant includes reference to the video in his argument that deployment of a Tow Assist tow crew member does not constitute a danger.

[51] The second point refers to claims by the respondents that having a second D-licensed crew member permits them to replace each other as operator or observer and thus to avoid or cope with fatigue. Counsel for the appellant submits that replacement was not an issue in the refusal and that there is no indication that it is a safety risk and was not identified as such by the HSO in his investigation.

[52] In concluding his submissions and argument, Counsel for the appellant reminds me that *Martin v. Canada*¹ in paragraph 28 holds that, “An appeal before an appeals officer is *de novo* [...]” and from paragraph 27 of the same Federal Court decision that:

Under section 146.1, an appeals officer may “vary, rescind or confirm a direction of a health and safety officer”. If a health and safety officer has made a direction under subsection 145(2) that the appeals officer considers inappropriate, he may rescind that direction. However, because he now has all the powers of a health and safety officer, he may also vary it to provide for what he considers the health and safety officer should have directed.

[53] Counsel further reminds me with a partial quote from an Appeals Officer decision in *Rehab Rivers v. Air Canada*² that, “my statutory jurisdiction is limited to making a decision based on the circumstances that existed at the time of the work refusal to determine whether the HSO arrived at the correct decision”; and that with regard to a danger having to be real and not speculative, *Verville v. Canada*³ at paragraph 36 states:

In that respect, I do not believe that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer’s reasons in *Martin* above, particularly paragraph 57, to require evidence of a precise timeframe within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such a circumstance will occur in the future, not as a mere possibility but as a reasonable one.

[54] With this jurisprudence in mind and in line with the testimony given, evidence entered and argument made for the appellant, Counsel for the appellant invites me to step into the HSO’s shoes and to conclude: that there was no danger present within the meaning of the Code when the respondents invoked refusals to work on January 24, 2011; that the training and knowledge of the Tow Assist employee meets the requirements of the duties; and that the refusals, if not motivated by labour relations concerns, were hypothetical and speculative. In the alternative, should I find that a danger

¹ 2005 FCA 156.

² 2010 OHSTC 11.

³ 2004 FC 767.

did exist at the time of the refusals due to lack of training, I should vary the direction and direct the appellant to remedy training deficiencies.

Respondents' submissions

[55] Counsel for the respondents submits that the simple question to be answered is whether or not there is a health and safety danger associated with Air Canada's decision to change the Douglas Towbarless tow tractor crew from two D-licensed members to one D-licensed tow operator with a Tow Assist observer lacking a D-license. He agrees that the heart of the issue is the qualifications and skills of the second crew member with respect to undertaking radio communications and knowledge of airport geography, factors that he submits provide important support to the Tow Operator who must pay full attention to manoeuvring the tow.

[56] Counsel adds that the issue is not whether the second crew member can drive the Douglas Towbarless tow tractor, an ability acquired through additional training after the D-license has been obtained. In this connection, Counsel argues that the appellant has placed too much emphasis on the driving portions of the GTAA D-license Lesson Plan which he maintains are mostly not about driving skills but rather are focussed on use of the radio and hands on experience of the airfield geography. In brief, the respondents' submission is that the appellant's in-house training program does not provide the Tow Assist with sufficient skills and knowledge in these key competencies and that, unlike the D-license qualification, is not subject to GTAA external testing. Counsel argues that failure to require a D-license for the second operator will put the health and safety of the tow crew and, potentially, of the public in danger.

[57] Citing *Verville v. Canada* with respect to the testimony of "ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion", Counsel draws frequently on testimony given by the respondents' witnesses, Craig Adams, Air Canada's full time trainer for both the D and DA-licenses, and Terry Hanson an Air Canada serving Douglas Towbarless tractor operator and one the three refusing employees. Both witnesses testified as to the importance of the second D qualified crew member.

[58] Mr. Adams testimony addressed the complexity of the Douglas Towbarless tractor which he described as having five driving modes and being the only drive by wire tow in use at Pearson International. He emphasized the positioning of the right-hand drive tractor's two radios on the passenger side that, with an insufficiently trained second crew member, would require the Tow Operator to lean across while driving to change through the five ATC ground control frequencies at Pearson International.

[59] Mr. Adams termed the Tow Operator as the Captain with additional responsibilities for driving and returning the tow and its load safely to their destination, a process he described as frequent, often involving lengthy distances, occurring in all weathers and available twenty-four hours a day. In Mr. Adams' view these factors

support the need for a second crew member with the same qualifications as the Tow Operator and able to take over the operator's position. In the latter respect, Mr. Hanson testified that his preferred practice is to interchange with the second crew member on an alternate day basis in order to relieve fatigue.

[60] With respect to the Discovery Channel video that contains footage of Mr. Adams taking a loaded Douglas Towbarless tractor into the manoeuvring area without a second crew member, Counsel emphasizes, as did Mr. Adams, that the demonstration took place during a quiet period at Pearson International and that it was pre-arranged by Air Canada with approval from Air Traffic Control.

[61] In support of the claim that Air Canada's Tow Assist training program compares unfavourably with that for the GTAA D-license, Counsel again highlights testimony given by the respondents' witnesses. Based on that testimony, Counsel suggests that an overall shortcoming of Tow Assist training resides in its emphasis on a theoretical rather than practical base. With respect to radio communications, Counsel submits that, in order to pass the Industry Canada test and obtain an ROC-A, a part of the Tow Assist Lesson Plan, a candidate need merely study the book and has no need to actually use a radio. He refers to Mr. Adams testimony that candidates for the two week GTAA D-license training program, who would have an ROC-A as a pre-requisite, receive daily training on radio skills beginning with classroom simulations but subsequently moving to calls in the field when being driven by the instructor.

[62] Likewise with airport geography, Counsel for the respondents submits that the Tow Assist training program does not compare with that for the D-license. He argues that Mr. Adams testimony, while acknowledging that both programs include viewing the AVOP video as well as some other common features, demonstrates that time spent on daily practice drills by the D candidates far exceeds the 45 minutes of airport geography scheduled in the Tow Assist Lesson Plan. Counsel says that the 45 minute slot is characterized by the two respondent witnesses as a superficial subset of geographic information. It is further argued that exposure to the airfield and its signage is part of the D program, a factor that Mr. Hanson finds particularly important since runway and taxiway markings are often tilted in favour of the pilot's looking down perspective rather than the tow crew's ground level view.

[63] Counsel refers to the difference in the examination processes for the respective programs. He argues that the D licensing process is set and administered by the GTAA and that Mr. Adams confirmed that testing includes both written and practical components. Counsel submits that the Tow Assist employee is examined by an Air Canada trainer and that the company could have an incentive to pass all candidates. It is further claimed that, while the D-license exam is repeated every three years, there is no further testing for the Tow Assist employee.

[64] Counsel submits that the risk assessment of May 7, 2010 [Exhibit1, Tab 6] is of very limited use in determining the dangers associated with tow operations. This

submission appears to be based largely on limitations of the process undertaken to create the document. Mr. Adams testified that none of the management members of the assessment committee had tow experience and that they declined to join bargaining unit members on a tow. He further claimed that a consultant from management dictated his version of the risks to the committee with no room for discussion and that, as result, three of the bargaining unit members chose not to attend the second day of the meeting and were replaced.

[65] With respect to the TRB article on airfield incursions [Exhibit1, Tab 10] Counsel submits that the appellant misses the point when suggesting that the frequency of catastrophic incursions is very low. The point, he argues, is that the potential risk is very high since errors made when driving may cause death or serious injury. Echoing *Verville* Counsel argues, that such circumstances will occur in the future is not a mere possibility but a reasonable one. During his oral final argument and in further support of concerns about the potential for incursions, Counsel produced an article from the Toronto Star of November 27, 2011, titled "Near collision at Pearson not such a rare event." The article states that incursions happen at Canadian airports on average once a day.

[66] Also during oral final argument, Counsel for the respondents submitted a brief of research studies on the use of cell phones while driving and the increase of driver error when attention is divided. He draws a parallel with the use of the radio in the tow tractor and the need for a second and qualified crew member to handle radio communications leaving the operator to concentrate on driving.

[67] The respondents reject the assertion that their refusals were motivated by labour relations considerations and Counsel reviews the nature of the grounds expressed for the refusals by the refusing employees. He concludes that all elements of their complaints were raised in evidence as real concerns by the respondents' witnesses and that there was no evidence to show that the refusals were for labour relations reasons or that they were related to a previous labour relations issue.

[68] On the somewhat related matter of an anticipatory refusal, Counsel argues that being anticipatory does not make a refusal invalid or motivated by labour relations reasons. He submits that the employees refused work based on a fundamental change to their working conditions that would team them with an untrained or grossly under trained Tow Assistant.

[69] In conclusion Counsel reiterates the major elements of the respondents' arguments, submitting that an activity that is already fraught with risk involves greater risk when one of the two crew members has only theoretical knowledge of the airfield and no experience in operating the radio. He disputes what he describes as the appellant's claim that Tow Assists will be able to learn airfield geography while working in the position arguing that, without sufficient training and knowledge, the incumbents will take a long time to become confident. Underlining the complexity of Pearson International, Counsel requests that the HSO's decision be upheld and that Air Canada continue using

two Tow Operators in its towing operations or, at the very least, provide sufficient training to the D-license level for the second crew member in the Douglas Towbarless tractor.

Appellant's reply submission

[70] While not disagreeing with the respondents that the heart of the issue is the qualifications and skills of the Tow Assist, Counsel for the appellant emphasizes that this tow crew member is the second resource to the Tow Operator and that his or her qualifications must be assessed in conjunction with the Tow Operator's skills and qualifications.

[71] Counsel defends the argument, made in his initial submission and challenged by the respondents, that driving instruction forms a significant part of the GTAA D-license training program, submitting that the driving components account for 7.5 hours or 68% of the total 11 hour lesson plan. He adds that the evidence indicates that the D-license is essential for driving in the manoeuvring area and the GTAA test assesses the ability to do so.

[72] On the adequacy of the Tow Assist training program Counsel disputes several points in the respondent's arguments. He disagrees that the GTAA D-license test is needed to verify that the Tow Assist has sufficient skills and knowledge to meet the duties of the position but does indicate that, if required, Air Canada could be directed to establish a specific program to test Tow Assist candidates' competencies.

[73] Counsel submits, in reply to claims to the contrary, that the Tow Assist training program will provide for in vehicle and hands on training in airport geography knowledge and radio communications skills in the same manner as is provided to the GTAA D-license candidates. He argues that the two days added to the program since the stay was issued will ensure the adequacy of such training. He further takes issue with Mr. Adams' assertion that the D candidates do not drive and operate the radio during their training and submits that such is in apparent conflict with the prescribed GTAA lesson plan. In a similar context, Counsel disputes the respondents' characterization of the lesson plan as guidelines.

[74] Counsel rejects the respondents' submission that the Tow Assist training program was developed without consultation with the Tow Operators. He maintains that the program was developed following the risk assessment of May 20, 2010, was carried out. He submits that the risk assessment process involved Air Canada management, worker health and safety representatives and Mr. Adams, and that the respondents are endeavouring to minimize the value of the risk assessment because their union withdrew from the process.

[75] On the respondents' argument that the complexities of Pearson International require a second D licence person to assist in the Douglas Towbarless tractor, Counsel

argues that there is no evidence that two operators are required for such a purpose and notes that Mr. Adams was content to operate the equipment on an active runway, with the distractions of the filming, by himself and without apparent safety concerns.

[76] Somewhat related and pointing to Mr. Hanson's testimony, Counsel submits that the refusing employees considered that the airside training of Tow Assists was insufficient without knowing anything about the level of that training.

[77] On Tow Assist training issue in general, Counsel states the following: "The issue is not whether the training provided is better than or even as good as that provided to the D certified operator. The issue is whether the qualifications of the Tow Assist in conjunction with the full training of the Tow Operator places the Tow Operator in a position of 'danger'." Counsel argues that there is no evidence to support such a conclusion.

[78] With respect to the Toronto Star article referred to in paragraph 65 above, Counsel submits that it was not available at the date of the hearing and should not be raised as new evidence. He further argues that it includes statistics without source references, involves two aircraft rather than vehicles, has no relevance to training of ground vehicle personnel, lacks probative value and should not be accepted.

[79] On the documentation introduced by the respondents on the distractions of cellular telephone use while driving, Counsel disputes its relevance at length but in essence draws a distinction between a call that distracts and a call that is part of the job at hand; that is, moving the tow in accordance with ATC authorizations and instructions. He adds that the Tow Operator is "solely responsible for driving the tow vehicle" and "has no communication responsibilities with the ATC". Rather the Tow Assist who is not driving has the communication responsibility.

Analysis

Preliminary matters

[80] Initially I will address the concern raised by Counsel for the appellant about the anticipatory nature of the refusals and his claim that there was an overlying labour relations issue. With respect to their anticipatory nature, it is important to recall the background to the refusals as seen by the refusing employees. Testimony and evidence during the hearings indicated an existing practice that deployed two Tow Operators, each having qualified for a D-license and having subsequently received additional training for driving and operating the Douglas Towbarless tractor at Pearson International. The employer planned to change that practice such that only one member of the tow crew would have the D-license and the same additional training.

[81] The employees' statements of refusal indicate that they believed the change in practice would pair them with a person lacking training and airside geography knowledge

and require them to assume additional responsibilities when performing a tow, factors that they considered would put them in danger. Counsel for the appellant submitted that none of the refusing employees had worked with a Tow Assist employee in a tow crew and that they had not taken account of the Tow Assist training program. The inference being either that, with such experience and knowledge, they would not have had reasonable cause to believe that a danger existed, or that, without such experience and knowledge, they lacked justification for the refusals.

[82] I do not accept that the anticipatory nature of the refusals puts them *ab initio* beyond the scope of subsection 128(1). On the face of things, the change planned by the employer entailed a significant departure from longstanding practice and, for the refusing employees, raised concerns as to the ability of a Tow Assist second crew member to provide support in the safe movement of the Tow. Differences as to comparative levels of training and knowledge of the Tow Operator and Tow Assist are, as both Counsel appear to agree, at the heart of this appeal. It is not reasonable to interpret the language of subsection 128(1) as requiring a "try it and see" test before an employee can exercise the right of refusal and in the present case I am of the view that the employees had reasonable cause to invoke the right. Whether the reasons they gave for the refusals amounted to danger within the meaning of the Code was the substance of the HSO's investigation and is a main issue in this appeal.

[83] With respect to an overlying labour relations issue, Mr. Spellacy's testimony, noted in paragraph 22 above, referred to tow operators bidding out of the position some three years previously in connection with claims for premium remuneration for their duties. Mr. Hanson, one of the refusing employees, in his testimony recalled that the bidding out issue had to do with tow operators inheriting duties on the flight deck of an aircraft. In any event, the matter went to arbitration and Mr. Spellacy advised that the arbitrator determined that the bidding out amounted to concerted action and warranted an order requiring the tow operators to remain in the position. Mr. Spellacy believed that a three year period was suggested whereas Mr. Hanson recalled an unspecified period that applied while the company trained additional D-licensed tow operators. At the hearings, Counsel were afforded an opportunity to provide the arbitral decision but chose not to do so.

[84] I am not convinced by the testimony and argument made that the refusals were motivated by labour relations concerns. For reasons similar to those given above on the anticipatory nature of the refusals, I am of the view that the refusing employees had reasonable cause to believe that the change in crew consist practice could give rise to a danger. Even if I were convinced that labour relations issues were motivators, the jurisprudence cited by Counsel for the appellant would simply require me to give "very close scrutiny" to the matter at hand; advice that seems appropriate to all appeal proceedings.

[85] While not strictly a preliminary matter, I want to address here the research brief introduced by the respondents during oral final argument and concerning distractions

caused by cell phone use when driving (see paragraph 66 above). I agree with Counsel for the appellant that there is a considerable difference between communications that distract from driving and those, like contact with ground control, that are intrinsically related to moving the vehicle safely through the airfield. While the Tow Operator carries prime responsibility for establishing and monitoring communications with ground control, he or she is able to follow them without the physical distraction of operating the radio and adjusting frequencies, functions of the second crew member. I find the material of limited application to the appeal.

The HSO's findings

[86] The HSO's report included a 23 bullet list of facts established during the investigation. As noted some of these facts are challenged by the appellant and testimony given and evidence entered during the hearings confirms that certain of the HSO's factual findings were simply not accurate or were incorrectly interpreted. Part of the problem may have arisen from a lack of clarity in some areas as to quite what is permitted or prohibited by the rules and policies of the GTAA and Air Canada.

[87] The issue of the Tow Assist being able to use the radio offers an example of the latter point. The HSO concluded correctly that the Tow Assist would have an ROC-A certificate and would be trained in the use of the radio, but found incorrectly that the employee would not be permitted use the radio in the manoeuvring area. There may have been confusion in what he was initially told by an Air Canada official in this respect.

[88] At the hearings we had the benefit of Mr. Spellacy's testimony and the evidence of his e-mail correspondence with GTAA officials [Exhibit 1, Tab 7]. There, in response to a direct question to the GTAA, it is indicated that there is nothing in the ATDs that addresses use of the radio in the manoeuvring area by a DA Tow Assist with an ROC-A. This, what might be termed "approval by omission", is interpreted by Air Canada as authorization for radio communications being handled by the Tow Assist. I accept that it is not a prohibition and disagree with the HSO's finding that the Tow Assist is unable to use the radio.

[89] The HSO also concludes that the DA Tow Assist does not receive training on the details of the manoeuvring area, specifically the runways and taxiways and without such knowledge cannot effectively communicate with the ground control towers. This conclusion seems to ignore the Tow Assist Lesson Plan that includes 45 minutes instruction time for airport geography which Counsel for the appellant argues is supplementary to that already received as part of the DA-license training program. Mr. Campbell's testimony confirmed that the latter program includes, viewing the AVOP video, exercises in identifying runways and taxiways on unmarked maps and, in his case at least, entailed being taken by the instructor on a four hour drive around the manoeuvring area. The ATD manual describes a written DA-license test that requires candidates to correctly answer a mandatory site identification map question. While comparability of the levels of Tow Assist and D-license training on airport geography is a

matter of dispute, the evidence contradicts the HSO's finding that DA-license candidates do not receive any such training.

[90] The evidence on radio use and airport geography indicates, contrary to the HSO's finding, that the Tow Assist will be able and expected to perform functions when the tow tractor with an aircraft is in motion and will have responsibilities before the tow destination is reached.

[91] There is also an issue with the HSO's conclusion that DA-licensed employees are not tested by the GTAA. It may be a matter of semantics but, as noted above, there is a specific test for the DA-license set by the GTAA. The written test consists of 30 questions. The passing grade is set at 90 percent. The test may be administered by a non-GTAA employee who has been accredited for the purpose by the Authority and testimony indicates that Air Canada DA employees are tested in this fashion. According to the ATD manual at section 2.3.2, the only test that must be administered by a certified GTAA employee is the practical part, presumably the airfield driving part, of the D-license test.

[92] In reaching his decision the HSO considered that the change in the tow crew amounted to the performance of an activity that constitutes a danger to the employees while at work. He concluded that the Tow Assist would not be able and would not have training and knowledge to fulfill the second crew member's role. With the Tow Operator having additional responsibilities and being required to shift attention between multiple tasks, the HSO found that there would be the possibility of an incursion that may result in injury to the tow crew.

[93] Evidence of the above noted inaccuracies in the HSO's report calls into question the reasoning that led to his decision of danger. In effect, it was based on inaccurate findings that do not support key wording in his decision as set down in Section III of his report. Contrary to the HSO's findings, the Tow Assist, in addition to holding a GTAA DA-license and an ROC-A certificate, will be able and permitted to use the radio in the manoeuvring area, will have received training in airport geography and will have duties to perform during a tow. However, even though the HSO's pathway to his danger decision is questionable, the issue of whether or not a danger did exist when the refusals were invoked at Pearson International on January 24, 2011, remains to be assessed.

Were the refusing employees exposed to a danger at the time their exercise their right to refuse dangerous work?

[94] An employee's right to refuse work in the case of apprehended danger is provided for in subsection 128(1) of the Code as follows:

128(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

- (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
- (b) a condition exists in the place that constitutes a danger to the employee; or
- (c) the performance of the activity constitutes a danger to the employee or to another employee.

[95] The definition of “danger” in subsection 122(1) reads:

“danger” means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after exposure to the hazard, condition or activity, and includes any exposure that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

[96] When relating the definition to the circumstances leading to the refusals of January 24, 2011, I must consider:

- Was there an existing or potential hazard or condition or any current or future activity in place at the time?
- If so, is there a reasonable expectation that exposure to the hazard, condition or activity could cause injury or illness to a person exposed to it?
- Could the injury or illness be reasonably expected to be caused before the hazard or condition could be corrected or the activity altered?

In addition, I must be mindful of relevant jurisprudence including that cited by Counsel for the appellant and detailed in paragraphs 52 and 53 above.

[97] When considering whether or not the respondents were exposed to a danger on January 24, 2011, it is relevant to take account of the environment in which their work is performed. It was evident throughout the proceedings that both the apron and manoeuvring areas at Pearson International are most often a hive of activity as aircraft land, take off, are towed or serviced, and that such activity would be fraught with hazard including risk of incursions and other collisions or incidents that could lead to injury of employees at work if preventive controls and mitigating measures were not in place.

[98] It is also relevant to take account of testimony on and evidence of the particular features and complexity of the Douglas Towbarless tractor, its drive and steering systems that require the Tow Operator’s close attention, the location of its radios away from the Tow Operator, the need to change frequencies during a tow and the scope and duration of tow operations. Air Canada is the only carrier deploying the tractor at Pearson International and does not use it at other airports.

[99] In result, I find that the features of the tow tractor, together with the complexities of the airport, indicate the need for a second crew member trained to assist the Tow Operator in the safe operation of the Douglas Towbarless tractor. While acknowledging, as pointed out by Counsel for the appellant, that GTAA rules do not specifically require two persons in a tow tractor, and despite Mr. Adams' solo performance, I note that Air Canada fully supports the presence of a second crew member indicating in the Towbarless Operations section of Publication 70 that, "**In order to operate at the highest level of safety** [my emphasis], all towing operations are made with a Signalman/Marshaller/Tow Assist in the tractor" and, "The Signalman's/Marshaller's/Tow Assist's primary responsibility is to watch for hazardous conditions and communicate any potentially unsafe or emergency situations to the tractor operator." [Exhibit 1, Tab 4 at page 23]

[100] On January 24, 2011, the appellant, in line with its own policies, did not intend to run the Douglas Towbarless tractor without a second tow crew member. The issue for the refusing employees was the levels of training, knowledge and qualifications of the person who would fill the second place. Following his investigation, the HSO agreed with their position that the levels were insufficient and concluded that the Tow Operator would consequently be required to handle multiple tasks. He found that a danger did exist.

[101] I agree that the qualifications of the Tow Assist and the related training provided by the appellant, its adequacy and the levels of knowledge and skills gained by the tow assist employees are key factors to be taken into account when considering the appeal. However, such factors have to be measured against the requirements of the job. In this respect, the appellant Counsel's point in his reply argument that the Tow Assist is the second resource whose qualifications must be assessed in conjunction with the Tow Operator's skills and qualifications is relevant.

[102] In testimony Mr. Adams described the Tow Operator as the Captain, a characterization borne out by the division of responsibilities between tow crew members as set down in Air Canada's Publication 70 (Exhibit 1, Tab 4) and repeated verbatim in the Tow Assist Lesson Plan. The publication, at page 18, describes the Tow Operator's principal responsibility as, "The overall towing operation and aircraft movement in a safe and efficient manner from start to finish." Any doubt about who has the prime duty is removed in the e-mail exchange between Mr. Spellacy and the GTAA's Senior Manager, Safety and Security Operations, indicating that the Tow Operator retains responsibility for establishing communications with airport ground control and that "The operator of the vehicle will always be held responsible if something goes wrong." [Exhibit 1, Tab 7] That said, I note that while being Captain may generally denote greater responsibility, superior authority and possibly more experience (plus in this specific case the additional duty of driving) it does not necessarily imply lesser training and knowledge requirements.

[103] Although the Tow Assist is the second and somewhat subordinate member of a tow crew, the incumbent still has important functions to perform that, as Air Canada agrees in Publication 70, are necessary "**In order to operate at the highest level of**

safety" [My emphasis], a level of safety consistent with the purpose of the Code stated in section 122.1 and with the employer's general duty spelled out in section 124. Again, the question is what qualifications and levels of training equip the Tow Assist to acquit his or her functions at the required level of safety and were they in place for the Tow Assist on January 24, 2011? More pointedly, is it possible to conclude that operating the Douglas Towbarless tractor on that day, with a crew comprised of a D-licensed Tow Operator and a DA-licensed Tow Assist who had taken the Tow Assist training, amounted to a "danger" within the meaning of the Code?

[104] Despite documented differences in their respective roles, it has been Air Canada's practice for two similarly licensed and equally trained employees to constitute the crew of the Douglas Towbarless tractor at Pearson International. The respondents submit, among other considerations, that this has enabled tow crew members to spell each other off and swap the more onerous operator role for the less demanding second seat.

[105] I agree with Counsel for the appellant that tow crew members spelling each other off was not a matter raised in the refusals. Furthermore, I was given no convincing evidence that completing a shift in the same role involved safety issues. The most specific testimony was that given by Mr. Hanson who referred to some crew members who did not like working on the bridge that joins the aircraft to the terminal building and preferred to leave that role to the second crew member. In all, I find the issue to be peripheral to the respondents' main claims.

[106] At Pearson International significant control and preventive measures are afforded to Air Canada employees through steps taken by other than their employer. For example, the provision of air traffic control and the markings, lighting and rules of the road established by regulation and GTAA policies, all contribute to the elimination or reduction of hazards. The provision of a radio network enabling effective communications with ground control is also a positive consideration.

[107] None of these hazard mitigating factors would fulfill their purpose if workers at the airport, be they pilots, air traffic controllers, tow operators or station attendants, were not trained in their use and knowledgeable in their meaning. Ensuring that employees are so trained and knowledgeable is part of preventive measures provided for in section 122.2 of the Code and to a significant extent is a responsibility that falls to the individual employers active at the airport. In the present case the individual employer concerned is the appellant.

[108] What was the situation on January 24, 2011, when the appellants invoked their refusals at Pearson International? The appellant argues initially that the Tow Assist training, knowledge and skills in place were sufficient such that the incumbent could have fulfilled safely the responsibilities of the second tow crew member and that the HSO's finding of danger was in error. In the alternative, if a danger did exist, the appellant submits that it could be corrected by additions to the Tow Assist training plan and that the direction should be varied accordingly.

[109] The respondents' reply is that the HSO's findings and the direction he issued should be maintained or at the least the direction should require the second crew member to hold a D-license, implicitly forgoing the additional four weeks of training, job shadowing and supervised driving offered to the Tow Operators who drive the Douglas Towbarless tractor.

[110] Mr. Adams, the full time trainer for tow operations who well meets the Verville standard for "ordinary witnesses having the necessary experience", gave credible testimony as to the complexities of the Douglas Towbarless tractor, the challenges for tow crews of Canada's largest and busiest airport and the frequency and duration of tows likely to be undertaken by the two person crews. Although the two crew members have differing roles and functions, Mr. Evan's evidence supports the view that, in order to work together and communicate with each other as their duties require, they need to have a common understanding of airport geography, the same knowledge of airfield lighting and markings, including hotspots, and equivalent proficiency in radio communications and the specialized alphabet and language involved.

[111] The appellant submits that the Tow Assist training program as it stood on January 24, 2011, provided the candidate with the necessary skills and knowledge to fulfill the duties of the second tow crew member. In oral and written submissions Counsel for the appellant argues, driving apart, that there are similarities between the Tow Assist's training and that of the D-license holder. On radio communications, for example, he submits that "training is similar, if not identical". He initially argued for equivalency in training and knowledge gained in airport geography. However, in line with the appellant's alternative position, Counsel did acknowledge that any deficiencies in this respect could be compensated by additional training. As explained below, I do not accept that equivalencies in training between the Tow Assist and D-license training programs existed at the time of the refusals. Before getting there, I want to address the relevance of the risk assessments [Exhibit 1, Tab 6].

[112] Risk assessments are important tools. They are relevant to meeting the employer's duty under section 124 to ensure the safety of employees. They reflect the purpose of the Code to prevent accidents and injury to health as described in section 122.1. They are an essential means to identify preventive measures that, pursuant to section 122.2, should be developed to eliminate or mitigate to the extent possible hazards in the workplace. In the present case risk assessments were undertaken with respect to the projected change in the Douglas Towbarless Tow crew. Anticipated hazards were identified and mitigating measures explored. While much of the discussion appears to have been concerned with the adaptation of new crew members to the functions required, various risk factors were identified including the possible misinterpretation of instructions or an inability to catch mistakes due to communications issues. I perceive a thread in the document recognizing the need for equivalency of training for Tow Assists and Tow Operators in radio communications and airport geography. I find this perception to be confirmed in the final recommendations of the original assessment. The text of the recommendations in the

original assessment dated May 20, 2010, and retained in the revised assessment of April 27, 2011, reads as follows:

The proposed tow assist training program provides the required level of knowledge for an employee to obtain a D rated AVOP license within the proposed 2 weeks of training [My emphasis]. Despite the fact that the Tow Assist position does not technically require a D AVOP License, it is recommended that the official D License be promoted as a stepping stone to becoming a fully qualified Tow Operator, and to sustain future operational requirements.

[113] Returning to the issue of equivalency in training and knowledge in the key areas of airport geography and radio communications, I find the levels set in the GTAA authorized D training program to be instructive. The GTAA is a body with overall responsibilities for safe and efficient operations at Pearson International. I am aware that a literal application of GTAA rules would countenance operating the Douglas Towbarless tractor with a single crew member. However, as already noted, the appellant acknowledges that a second crew member is required in order to operate at the highest level of safety. As also noted previously, the second crew member, while not the driver, fulfills functions important to the safe operation of the Towbarless tractor and I accept that common understanding and knowledge by both crew members of the two key areas are required to meet the highest level of safety standard. I find it reasonable to look to the content of the GTAA D training program and its associated lesson plans [Exhibit 1, Tab 1] when setting the appropriate level of equivalency in those two key areas.

[114] The evidence presented to me does not support the appellant's contention of equivalency between the Tow Assist and D AVOP license training programs as they stood on January 24, 2011. Looking first at the appellant's initial submission, what were the training and skill levels of the Tow Assist at the time of the refusals and how did they compare with the standards of the D-license training plan? The Tow Assist lesson plan provides for just 45 minutes on airport geography. The appellant argues that the 45 minute slot is supplementary since Tow Assist candidates will already have passed a DA-license that Mr. Campbell testified includes significant airport geography content.

[115] Testimony indicated that D-license holders at Air Canada would also have held a DA-license at some previous point and their D training would have refreshed their previous knowledge. The respondents argue that the driving components of the D training program are centred on hands on experience with radio communications and airport geography rather than driving skills. I do not agree that the driving content of the program should be totally discounted and I accept the appellant's calculation that the D-license lesson plan provides for four hours of specific airport geography instruction. At the least, as acknowledged by Counsel for the appellant, there is a three and a quarter hour gap between the two training plans in a key knowledge element necessary for the safe operation of a tow.

[116] With respect to radio communications, the appellant compares the Tow Assist lesson plan's three hours of training plus an hour and a half for the ROC-A exam to the two hours training in the D lesson plan. The comparison overlooks the fact that D-license candidates are required to have an ROC-A certificate before entering their training program and does not take account of Air Canada's own ROC-A four hour lesson plan [Exhibit 1, Tab 2b]. While that lesson plan also includes time for taking the exam it still puts the total D training time for radio communications at six hours compared to the Tow Assist's four and a half hours.

[117] The shortfalls in training time and the lack of equivalency between the Tow Assist and the D-licensed employee in the key areas of radio communications and airport geography are significant. They existed at the time of the respondents' refusals on January 24, 2011, when it was intended to operate the Douglas Towbarless tractor at Pearson International with a tow crew composed of a DA-licensed Tow Assist and D-licensed Tow Operator. The Tow Assist would have performed all functions listed at page 18 of Publication 70 for the second crew member plus, as confirmed by the appellant, handling radio communications with the ground control towers. I have not addressed driving instruction time since the Tow Assist was and still is not expected to drive in the manoeuvring area.

[118] In line with my comments above with respect to preventive measures afforded at Pearson International by the GTAA and Air Traffic Control and their purpose being compromised if workers at the airport are not fully cognisant of their meaning and adequately trained in their use, as well as the need for both tow crew members to have a common understanding of airport geography and equivalent proficiency in radio communications, I find that the shortfalls in the Tow Assist training program create hazards for the employees concerned. Further, since I find the contention in the risk assessment that the Tow Assist training program provides knowledge equivalent to the D-license program was not then valid, the hazards identified had not been fully mitigated with the result that the performance of tow operations at the highest level of safety would have been compromised.

Is there a reasonable expectation that exposure to the hazard, condition or activity could cause injury or illness to a person exposed to it; and that the injury or illness could be caused before the hazard or condition could be corrected, or the condition altered?

[119] Addressing the first part of the question entails examining possible consequences of the hazards identified. Among the more serious of possible consequences at an airport is the risk of incursion. Mr. Dodds, one of the appellants, includes mention of incursions in his statement of refusal as follows: "The complex environment of runways and taxiways requires knowledge and training pertinent to avoiding any ATC incursions."

[120] In his decision quoted in paragraph 10 above, the HSO concluded that by having to spread their attention between multiple tasks (a finding that I have questioned) the

refusing employees would be put "at the risk of an incursion which may result in injury." In reaching this conclusion which provides his justification for the finding of danger within the meaning of the Code, he relied to a significant extent on a synopsis of a United States based Transportation Research Board (TRB) report and its description of the primary root causes of incursions [HSO's notes, point 22, Exhibit 1, Tab 8].

[121] As detailed in paragraphs 47 and 48 above, the appellant in both oral and written final submissions admonishes the HSO for attributing too much weight to the report and for failing to go beyond the synopsis. Had the HSO looked at the full study, "An analysis of the causes of airfield incursions attributed to ground vehicles", Counsel for the appellant argues that he would have concluded that the risk of incursion was extremely low and that the severity of the incursion (presumably including the prospect of injury to an employee) was also low. In short, Counsel submits that the HSO would have determined that the TRB report does not support a finding of danger within the meaning of the Code.

[122] Comment here about the structure and content of the TRB analysis published in 2009 is in order. I acknowledge that the study relates to the United States but the appellant made extensive reference to it in his submissions and nothing as comprehensive on incursions specific to Canada was presented to me. The study uses U.S. Federal Aviation Administration (FAA) data, noting that in October 2007 the FAA adopted the International Civil Aviation Organization (ICAO) definition of runway incursion as "any occurrence at an aerodrome involving the incorrect presence of an aircraft, vehicle or person on the protected area of a surface defined for the landing and takeoff of aircraft." Previously the FAA had referred to "surface incidents". It appears that the ICAO definition is more comprehensive and led to a noticeable increase in the number of reported of incursions in fiscal 2008 vs. fiscal 2007 following the change. Incursions are classified in three categories: Pilot deviation (PD); Operational error/deviation (OE/D); and, Vehicle/pedestrian deviation (V/PD). PD and V/PD are self-explanatory; OE/Ds generally involve air traffic control errors. In the period fiscal 2004 to fiscal 2007, PDs accounted for 55%, OE/Ds 29% and V/PDs 16% of reported incursions.

[123] In addition to categories of runway incursion, the report describes FAA endorsed categories of severity of incursions ranging from: A, requiring participants to take extreme action if a collision is to be avoided; B, significant potential for collision; C, ample time to avoid a potential collision; and, D, meets the definition but no chance of a collision. According to the FAA Runway Safety Report 2008, A and B level incidents together account for just 5% of the incursions, level C for 30% and level D for 60%.

[124] In assessing circumstances that lead to runway incursions the report cites and agrees with other study groups, including the FAA Runway Safety Council and Working Group. The circumstances identified are: confusing airport runway and taxiway layouts; visibility limitations with night operations and adverse weather conditions that may reduce situational awareness; high traffic volumes that may lead to operational errors;

and, communication errors including issues in terminology and unclear radio communications.

[125] Turning specifically to V/PD incursions, the main subject of the study and most relevant to the circumstances of this appeal, the TRB report analyses their potential causes using FAA data from records of 2,774 V/PDs reported by some 450 airports across the United States during close to a decade ending on January 1, 2008. Vehicles were involved in some 75% of the incursions with pedestrians accounting for the remaining 25%. A total of 539 of the occurrences "were reported specifically as runway incursions, with the remaining reported as incursions in another controlled part of the airfield movement area, most often on an active taxiway or ramp." Types of vehicles most often involved are described as operational vehicles and maintenance trucks each accounting for over 20% of the incursions. Aircraft in tow and the tug each account for approximately 7%. Airport employees are identified as responsible for causing about 24% of the incursions with other government employees following closely at about 22%.

[126] Some of the 450 airports covered by the report appear to be far less sophisticated and busy than Pearson International. However, a relevant statistic cited in the report concerns three major U.S. airports. Based on FAA runway incursion data, the study identifies Chicago, Atlanta and Philadelphia as "the three airports with the most V/PDs, approximately 90 per cent of all V/PDs are vehicle deviations, while less than ten per cent are caused by pedestrians. At these airports, the total number of V/PDs accounted for between approximately 25 per cent and 30 percent of runway incursions on these complex and busy airfields." The study continues: "Many of these deviations were found to be the result of 'lost situational awareness'."

[127] The authors of the study drew on some 400 of the reported incidents that included descriptions of the events and grouped the individual descriptions into four categories of alleged causes. The four categories are: driver distraction including having to divert attention to radio communications; inadequate training or knowledge of the airfield or operating procedures; lack of situational awareness; and, lack of proper communication. Each of the categories are further analysed in the report with percentages of incursions attributed to them; driver distraction at 10%; inadequate training 38%; lack of situational awareness 41%; and, lack of proper communication 11%. With specific respect to training which is of direct relevance to the appeal, the report names four areas where it finds that inadequacies have contributed to incursion incidents: movement area procedures; airport layout; signs, markings, signals and lighting; and, air traffic control terminology.

[128] The report concludes with the following observations: "From the above analysis, airport ground vehicles have been found to be a significant contributor to runway incursions as well as incursions on other areas of the airfield". Further, "it was found that the primary causes of vehicle incursions revolve around loss of situational awareness, either due to a lack of training or spatial disorientation as a result of a range of factors, from reduced visibility to external distractions." To address resulting issues the report

ventures it would be prudent to find mitigation strategies. It recommends enhanced operator training as the first focus with enhanced technologies as the secondary approach.

[129] The appellant does not fundamentally dispute the four point grouping of the potential root causes of incursions as identified in the TRB study and noted by the HSO. The appellant's focus is more on the implications of the report's findings claiming them to reflect the infrequency of incursions and the remoteness of the prospect for employee injury should they occur. The appellant's final submission details several of the same statistics in the report that I have referred to above, arguing that they do not support a finding of danger. For example, attention is drawn to the 60% predominance of category D incursions reported that carry no chance of collision, as against the 5% total of the more serious categories A and B. On inadequate training and knowledge, a factor found to be related in the TRB study to 38% of the reported incursions, attention is drawn to the breakdown of 65% having involved an operator who had not completed training and to the 33% of airports where no training is offered. On driver distraction the appellant points out that in two thirds of the cases the operator was simply disoriented. With respect to a lack of proper communication the report's finding that 32% of the vehicles involved possessed no functioning communication equipment.

[130] Drawing together these observations, the appellant calculates that over the ten year period covered in the TRB study there was an average of 0.61 incursions per airfield per year and that, when discounted for the 25% that were attributable to pedestrian deviations, the vehicle deviation figure drops to 0.46. Reiterating the 60% D category incursion factor, the 32% of airports studied with no functioning communication equipment and the 33% with no training program, plus the alleged 80% operator failure rate to follow proper air traffic control or other movement area procedures, the appellant submits that the HSO, had he considered the full study, would have found that it did not support a finding of danger.

[131] The respondents' closing submission is relatively brief on the TRB report. As indicated in paragraph 65 above, the respondent's main point is that, while the frequency of incursions is low, the potential risk is very high. Arguing that replacing the trained second crew member of the Douglas Towbarless Tractor crew member "with a Tow Assistant who is essentially untrained in two essential areas [...] will drastically increase the risk of accidents and injury", the respondents submit that such an outcome "is not a mere possibility but a reasonable one."

[132] Two other documents relating to incursions were drawn to my attention. First is the extract from the TSB report referred to in paragraph 49 above. The second is the Toronto Star report of November 27, 2011, referred to in paragraph 65 above. Both refer to incursions involving aircraft and do not include a tow tractor or other vehicle. I find them to be of limited relevance to the appeal and agree with Counsel for the appellant that the newspaper article lacks solid references to support its point.

[133] While the TRB report addresses vehicle incursions at airports in the United States, I find it reasonable to apply its findings and conclusions to Canada and, more specifically, to Pearson International. In doing so I come to a different conclusion than that reached by the appellant. With respect to circumstances that may lead to incursions outlined in paragraph 124 above, evidence indicates that Pearson International has a, if not confusing, complex runway and taxiway layout, complete with "hot spots". Its round the clock operations and susceptibility to the vicissitudes of our climate can entail visibility issues. As Canada's largest and busiest airport periods of high volume traffic are common. As a continental hub, Pearson International is very much in the same class as the three U.S. airports identified in the TRB report as the locations for some 25% to 30% of the V/PDs covered in the study. The report does not find tow vehicles to be among the more serious offenders. However, aircraft in tow and the tug are each accountable for 7% of the incursions, not inconsiderable figures. Similarly, although category A and B incursions amounted to only 5% of the total, collision was a reasonable prospect in all such cases.

[134] Incursions involving tow tractors are apparently quite rare at Pearson International. Mr. Adams in testimony recalled only one serious incident some eight or more years previously when a runway was crossed without clearance. He did refer to other minor but unspecified incidents occurring especially in inclement weather. Mr. Hanson referred to an incident the previous winter when, towing a Boeing 777 to the Cargo West Hangar, he encountered black ice and faced a potentially serious accident. While not frequent, these incidents did happen and carried a potential for causing injury to the employees involved. There is no guarantee that they will not occur in future with potential or actual injury resulting. It is reasonable to conclude that preventive measures provided by the GTAA and by individual employers at the airport deserve at least some credit for Pearson International's positive record. As I have asserted above, preventive measures without fully trained and knowledgeable employees are not likely to serve their intended purpose. In this connection the TRB report flags inadequacies in training on airport geography and communications with air traffic control as contributing to vehicle incursions. The two training areas are those that I have found to have been diluted and short changed in the Tow Assist training program as it stood on January 24, 2011, when the refusals were invoked.

[135] In all, I conclude that Air Canada's decision to replace the second D-licensed tow crew member with a DA-licensed Tow Assist and the lack of equivalency in airport geography and radio communications in the Tow Assist training program in relation to the D-license program, created hazards on January 24, 2011, that are capable of resulting in an incursion. At a complex and busy airport like Pearson International, while an incursion may not lead to a collision every time, it is reasonable to anticipate that one could occur. Not every collision leads to injury but injury is often the result of a collision. With *Verville* at paragraph 36 in mind, it is not necessary for me to establish precisely when the hazards will manifest themselves or when they will result in injury. However, the testimony and evidence before me of the factors and incidence of incursions at comparable airports, of past occurrences and of the nature of the work and work

environment at Pearson International as detailed above, establish that an incursion leading to a collision and resulting in injury will occur, not as a mere possibility, but as a reasonable one.

[136] The lack of equivalency in Tow Assist training created hazards constituting a danger on January 24, 2011, and Air Canada was not prepared at that time to change its decision to staff the Douglas Towbarless tractor with a D-licensed Tow Operator plus DA-licensed Tow Assist. Given the nature of training deficiencies, it was not practical to remedy them on the spot even if the employer had decided to make a change. As long as the intention was to go ahead with the changed crew consist on January 24, 2011, the possibility of injury being caused before the activity could be altered was a reasonable one.

[137] I have arrived at the same decision as the HSO but for different reasons. The differences in our reasoning mean that, while maintaining the danger decision, I cannot retain the wording of the HSO's direction. When elaborating on the appellant's alternative submission for disposition of the appeal, Counsel for the appellant argued that, in the event I make a finding of danger, I should modify the direction to direct correction of the training deficiencies taking cognizance of changes made to the Tow Assist training program as a result of the original direction. Counsel submitted that the changes, including additional training in radio communications, airport geography and knowledge of the manoeuvring area, make Air Canada fully compliant with any deficiencies that had been noted. Further, the appellant requested that, as an alternative, I "issue a ruling that if the right to refuse was proper the danger identified by the HSO has been remedied by Air Canada's compliance with its undertakings in the stay application process."

[138] On the first point, Counsel for the appellant referred more than once to two days that had been added to the Tow Assist training program. Specifically the revised risk assessment of April 27, 2011, states that, "Add two additional days of maneuvering familiarization on the job. The d/a assist would ride along on live tow and perform communications with support of an instructor monitoring the communications in a ride along vehicle (plus 1)." Provision is also made for training with respect to hotspots and emergency procedures related to them. On their face, these changes appear to remedy the lacks of equivalency in the Tow Assist training program that I find existed on January 24, 2011. However, as explained in the following paragraph, I am uncertain as to quite what has been implemented in practice and for greater certainty will vary the direction in accordance with my decision.

[139] On the second request, the list of undertakings is more comprehensive than the specific changes to the Tow Assist training program dealing as it does with meetings of the National Health and Safety Policy Committee, as well as the issuance of bulletins and safety awareness audits. When Appeals Officer Lafrance issued the stay of the direction on May 16, 2011, he requested that regular written reports be sent to him every two weeks on implementation of the undertakings. No reports were provided. When I raised this matter at the hearing on September 27, 2011, I was given to understand that there had

been no reports and that status quo had been maintained on tow operations pending disposition of the appeal.

Decision

[140] For the reasons given above, I find that operation of the Douglas Towbarless tractor as scheduled at Pearson International Airport on January 24, 2011, with a two person crew comprising a DA-licensed Tow Assist whose training in airport geography and radio communications lacked equivalency with that of the D-licensed Tow Operator, constitutes a danger within the meaning of the Code. The increased risk of incursion may result in injury to an employee. Pursuant to my authority under paragraph 146.1(1)(a) of the Code, I hereby vary the direction. The varied direction is attached to this decision.

Michael McDermott
Appeals Officer



Ottawa, Canada K1A 0J2

APPENDIX

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

On January 24, 2011, Health and Safety Officer Domenico Iacobellis conducted an investigation following a refusal to work made by **Mr. Gerald Dodds, Terry Hanson, Ron Andrews** in the work place operated by Air Canada, being an employer subject to the *Canada Labour Code*, Part II, at P.O. BOX 6002, (Tow Operations), TORONTO AMP, Mississauga, Ontario, L5P 1B4, the said workplace being sometimes known as Air Canada- (Tow Operations).

The Appeals Officer considers that the performance of an activity constitutes a danger to an employee while at work:

Operation of the Douglas Towbarless tractor with two person crew comprising a “DA” licensed Tow Assist whose training in airport geography and radio communications lacked equivalency with that of “D” licensed Tow Operator constitutes a danger within the meaning of the Code. The Tow assistant’s lack of training in those two areas increases the risk of incursion that may result in injury to an employee.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to alter the activity that constitutes the danger immediately.

Varied as identified in underlined text above, at Ottawa, this 22nd day of June, 2012.

Michael McDermott
Appeals Officer

To: Air Canada
P.O. BOX 6002, (Ramp & Baggage)
Toronto AMP
Mississauga, Ontario
L5P 1B4